

)	Chapter 11
In re:)	
)	Case No. 18-50757 (AMK)
FIRSTENERGY SOLUTIONS CORP., <i>et al.</i> , ¹)	(Jointly Administered)
)	
Debtors.)	
)	Hon. Judge Alan M. Koschik
)	

FirstEnergy Corp. ("FE Corp.") and its non-Debtor subsidiaries (collectively, the "FE Non-Debtor Parties") hereby submit this reply (this "Reply")² to the supplemental briefs in opposition (the "Opposing Briefs")³ to the *Motion of the Debtors for an Order (I) Approving*

Five Opposing Briefs were filed with the Court: (a) the *Objection to Plan and Disclosure Statement*, filed by creditor Rexel USA, Inc. [Docket No. 2388] (the "Rexel Brief"); (b) the *Brief of National Labor Relations Board in Opposition to Debtors' Proposed Third-Party Releases* [Docket No. 2393] (the "NLRB Brief"); (c) the *Ohio Consumers' Counsel's Statement that FES's Proposed Third-Party, Non-Consensual Release in its Second Amended Plan Fails to Satisfy the Legal Standards for Approval and Risks Harming Consumers* [Docket No. 2395] (the "OCC Brief"); (d) the *Supplemental Brief of Sierra Club in Support of Objection to Approval of Debtors' Disclosure Statement on the Basis of Non-Consensual Third-Party Releases in Plan* [Docket No. 2396] (the "Sierra Club Brief") and (e) the *Supplemental Brief of the United States on Behalf of the EPA and NRC, State of Ohio, and Pennsylvania Department of Environmental Protection Objecting to Debtors' Motion for an Order Approving Disclosure Statement* [Docket No. 2398] (the "Governmental Entities Brief").

Disclosure Statement, (II) Establishing Procedures for Solicitation and Tabulation of Votes to Accept or Reject the Debtors' Joint Chapter 11 Plan, (III) Approving the Form of Ballots, (IV) Scheduling a Hearing on Confirmation of the Plan, (V) Approving Procedures for Notice of the Confirmation Hearing and for Filing Objections to Confirmation of the Plan, and (VI) Granting Related Relief [Docket No. 2121] (the "Disclosure Statement Motion"). In support of this Reply, the FE Non-Debtor Parties respectfully state as follows:

PRELIMINARY STATEMENT

1. Unable to argue that non-consensual third-party releases are impermissible in light of controlling law in this Circuit pursuant to Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.), 280 F.3d 648, 656 (6th Cir. 2002), the Opposing Briefs inundate the Court with inapplicable and irrelevant case law hoping to establish that the FE Non-Debtor Parties' Third Party Release differs in some unspecified yet fundamental respect from the releases approved in Dow Corning and other cases in this Circuit. As the FE Non-Debtor Parties' stated in their *Supplemental Brief in Support of the Disclosure Statement Motion* [Docket No. 2400]; however, there is nothing so unique about the FE Non-Debtor Parties' Third Party Release (and the Plan's inclusion thereof) that they might serve to render the Plan patently unconfirmable. Moreover, as the case law makes abundantly clear, any alleged factual issues related to the releases are, at best, properly dealt with at the plan confirmation hearing, with the benefit of a full factual record. To the contrary – the Plan is confirmable, and the Court should grant the Disclosure Statement Motion.

2. The FE Non-Debtor Parties file this reply for two reasons. First, to highlight how the objecting parties continue to insist that the Plan fails to satisfy a standard that *does not exist*

and is contrary to Dow Corning. Second, to illustrate how the Opposing Briefs' remaining issues are properly handled at confirmation.

**THE OPPOSING BRIEFS INVENT A STANDARD
SO THEY MAY ALLEGE THAT THE FE NON-DEBTOR
PARTIES' THIRD PARTY RELEASE FAILS A NEW AND DIFFERENT STANDARD**

3. The Opposing Briefs attempt to invent the standard that this Court only has jurisdiction to approve non-consensual third party releases of derivative – rather than direct – claims. The Opposing Briefs do not cite one case in the Sixth Circuit where a court has articulated a difference between these types of claims when examining non-consensual third party releases in the context of a plan of reorganization. It does not matter how often the Opposing Briefs cite Greektown,⁴ Drier,⁵ Madoff,⁶ CIS DIP,⁷ Arter & Haden,⁸ Steinberg,⁹ Tronox¹⁰ or Nat'l Century Fin. Enterprises¹¹ out of context; not one of these cases discusses

⁴ See Papas v. Buchwald Capital Advisors, LLC (In re Greektown Holdings, LLC), 728 F.3d 567, 576 (6th Cir. 2013) (examining non-consensual third party releases "in connection with a settlement agreement long after the plan of reorganization was confirmed").

⁵ See In re Dreier LLP, 429 B.R. 112, 133 (Bankr. S.D.N.Y. 2010) (examining chapter 11 trustee's request for non-consensual third party releases in a bar order entered in connection with a settlement agreement outside the plan confirmation process).

⁶ See In re Madoff, 848 F. Supp. 2d 469, 488 (S.D.N.Y. 2012) (examining proposed permanent injunction of creditor suits against a third party to be issued in connection with a settlement agreement between the third party and the Madoff trustee outside the plan confirmation process).

⁷ In re CS DIP, LLC, No. 12-01573, 2015 WL 5920892, at *12 (Bankr. M.D. Tenn. Oct. 9, 2015) (examining non-consensual third party releases sought as part of a bar date ordered entered in connection with a settlement agreement outside the plan confirmation process).

⁸ In re Arter & Hadden, LLP, 373 B.R. 31, 34 (Bankr. N.D. Ohio 2007) (examining *chapter 7* trustee's request for a bar order in connection with a settlement agreement which would enjoin non-debtor third parties from bringing causes of action against certain settling banks, who were also non-debtor third parties).

⁹ See Steinberg v. Buczynski, 40 F.3d 890, 893 (7th Cir. 1994) (not examining non-consensual third party releases in any way, but rather determining whether the trustee or the creditors were the correct party to bring an action to pierce the debtor's corporate veil).

¹⁰ See In re Tronox Inc., 855 F.3d 84, 100, 106 (2d Cir. 2017) (examining non-consensual third party releases contained in a bar date order).

¹¹ In re Nat'l Century Fin. Enterprises, Inc., 323 F. Supp.2d 861, 867 (S.D. Ohio 2004) (not examining non-consensual third party releases in any way, but rather determining whether to grant motions to abstain or remand for lack of jurisdiction).

non-consensual third party releases in the context of a plan of reorganization. Nor is it instructive when the Opposing Briefs rely on cases from jurisdictions that, unlike the Sixth Circuit, either have binding circuit level guidance that non-consensual third party releases are never permissible (as is the case in the Ninth Circuit) or ambiguous circuit level guidance on the issue (as is the case in the Tenth Circuit). See e.g., In re Lowenschuss, 67 F.3d 1394 (9th Cir. 1995); In re Midway Gold, 575 B.R. 475 (Bankr. D. Colo. 2017); In re Digital Impact, Inc., 223 B.R. 1 (Bankr. N.D. Okla. 1998).

4. The Opposing Briefs' invented standard is entirely foreign to Dow Corning, as the non-consensual third party release at issue in that case actually included direct claims. There, in addition to the non-consensual third party releases, the released parties also received releases from the debtor regarding the same categories of claims that third parties would be deemed to release. See *Amended Joint Plan of Reorganization of Dow Corning Corporation*, dated February 4, 1999 (as updated June 1, 2014) (the "Dow Corning Plan"), at § 8.3.¹² If the Dow

¹² Section 8.3 of the Dow Corning Plan includes both the release by the debtor and the non-consensual third party release that was at issue. See Dow Corning, 280 F.3d at 655 (citing section 8.3 of the Plan when discussing the non-consensual third party releases). Under the Dow Corning Plan, the term "Released Parties" included the non-debtor parties receiving the non-consensual third party releases (which included certain "Shareholder-Affiliated Parties" and "Settling Insurers") and the debtor. See Dow Corning Plan, at §§ 1.47 and 8.3. The non-consensual third party release released the Shareholder-Affiliated Parties and the Settling Insurers from certain "Products Liability Claims" held by third parties. The non-consensual third party release stated, in pertinent part:

on the Effective Date ... all Persons who have held, hold, or may hold Products Liability Claims, whether known or unknown, shall be deemed to have forever waived and released all such rights or Claims that they heretofore, now or hereafter possess or may possess against the Debtor-Affiliated Parties, the Shareholder-Affiliated Parties, the Settling Insurers, and, to the extent released by the Debtor under the settlement agreements with such Settling Insurers, the respective predecessors, successors, officials, shareholders, subsidiaries, divisions, affiliates, representatives, attorneys, merged or acquired companies or operations or assigns of the Settling Insurers.

See Dow Corning Plan, at § 8.3. Later in Section 8.3, the Released Parties, which included the debtor, the Shareholder-Affiliated Parties and the Settling Insurers, each released each other from the same Products Liability Claims as were subject to the non-consensual third party release. This mutual release stated, in pertinent part:

Corning Plan did not release direct claims of third parties against non-debtor parties, but only released the non-debtor parties from derivative claims that could be brought by non-debtors on behalf of the debtor, having both a release by the debtor and a non-consensual third party release would have been superfluous. Derivative claims are within a debtor's power to release, as a debtor owns such claims. If the Dow Corning Plan only released derivative claims, upon the release of such derivative claims by the debtor, there would be nothing left for the third party releases to address. As the Dow Corning Plan included a release by the debtor and a non-consensual third party release regarding the same category of claims, the non-consensual third party release must have included "direct claims". This fact is fatal to the Opposing Briefs' invented standard.

5. Courts in this Circuit have *confirmed* plans of reorganization that provided non-consensual third party releases that made no distinction between "derivative" and "direct" claims. As stated above, the Dow Corning plan covered both "derivative" and "direct" claims. Further, the substance of the non-consensual third party release contained in the confirmed plan of reorganization in Detroit is a near mirror image of that of the FE Non-Debtor Parties' Third Party Release. Compare In re City of Detroit, 524 B.R. 147, 172 (Bankr. E.D. Mich. 2014) (quoting the plan to say "each holder of a pension claim releases the State and its related entities from all liabilities arising from or related to the City, this case, PA 436, or article IX, § 24 of the Michigan constitution") with Plan, at ¶ VIII.E ("the Holders of Claims and Interests shall be deemed to provide a full and complete release to the FE Non-Debtor Released Parties ... arising

Except as otherwise expressly provided in this Plan and the Plan Documents, the release under this section 8.3 shall further operate, as between all Released Parties, as a mutual release of all Products Liability Claims...

The Dow Corning Plan is available on the website of the Settlement Facility of the Dow Corning Trust (https://www.sfdct.com/_sfdct/resources/Final%20Plan1.pdf). The FE Non-Debtor Parties will bring multiple hard-copies of the Dow Corning Plan to the hearing on the Disclosure Statement Motion.

from or related in any way to (i) the Debtors, Reorganized Debtors, their businesses, or their property..."). The court in Detroit made no distinction between direct and derivative claims.

6. There is nothing about the Plan's inclusion of the FE Non-Debtor Parties' Third Party Release that makes the Plan patently unconfirmable because courts in this Circuit have *confirmed* plans of reorganization that include non-consensual third party releases similar in structure and scope to the FE Non-Debtor Parties' Third Party Release, including the release of so-called "direct claims".

**THE REMAINDER OF THE OPPOSING BRIEFS'
CONCERNS ARE PROPERLY HANDLED AT CONFIRMATION**

7. Once the invented "direct" vs. "derivative" argument is stripped away, the Opposing Briefs' complaints are reduced to confirmation issues that this Court should only decide with the benefit of a full factual record. A number of the Opposing Briefs argue that the plan is patently unconfirmable because certain of the factors analyzed by the Dow Corning panel do not apply to the Plan. On their face, however, the Dow Corning factors are factual inquiries. This Court should only determine whether "unusual circumstances" exist in these Chapter 11 Cases with the benefit of a full factual record, and the Debtors should have the opportunity to develop that record. The Court should not accept the Opposing Briefs' invitation to decide matters of fact without the benefit of evidence.

8. The NLRB Brief alleges that this Court does not have jurisdiction to release its hypothetical and unasserted claims against FE Corp. The National Labor Relations Board (the "NLRB") has made this argument before in other chapter 11 cases and lost. See e.g., In re 710 Long Ridge Rd. Operating Co., II, LLC, No. 13-13653 (DHS), 2014 WL 886433, at *11 (Bankr. D.N.J. Mar. 5, 2014) (holding that non-consensual third party release could cover claim of NLRB against non-debtor third party).

9. The Rexel Brief concerns an executory contract issue between Rexel USA, Inc. and the Debtors. While this dispute does not involve the FE Non-Debtor Parties, it is also clear that this cure dispute is an issue for confirmation and should have no bearing on the approval of the Disclosure Statement Motion.

CONCLUSION

The Plan is confirmable, and the Disclosure Statement Motion should be approved.

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Respectfully Submitted,

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